

bottom line, but it cannot rationally be ascribed to the business model for sustaining fresh standards development.

Commercial advantage also inheres in standards generated by businesses that profit from compliance determinations. On the Comm2000 website where Underwriters Laboratories offers its standards for sale, its Standard for Manual Signaling Boxes for Fire Alarm Systems, 52 pages long in all, costs \$502 in hard-copy and \$402 for a use-restricted pdf version; \$998 (\$798) purchases a three year subscription that includes revisions, interpretations, etc. However, the text of this standard incorporates by reference five other UL standards, whose purchase would add five times these amounts (as each of these referenced standards is identically priced). And even this would not complete the picture; one of these five referenced standards (746C, Standard for Polymeric Materials—Use in Electrical Equipment Evaluations) itself references 27 unique others, whose individual prices are often hundreds of dollars higher—for a total cost well in excess of \$10,000. Standards in the libraries of professional engineering SDOs are more likely to sell in the \$50 range. Comments in the FDMS dockets tend to assert that all standards are sold at reasonable prices, without giving concrete details. Neither OFR nor the incorporating agency exercises control over the reasonableness of price at the moment of incorporation. And, once incorporation has occurred, any opportunity for price control by the OFR or the incorporating agency vanishes. Of course, if standards were treated merely as guidance, not law, market forces would operate as one control; and agencies could more freely remove a standard from its compliance guidance if persuaded its price had become unreasonable—either in general, or in its application to vulnerable small businesses.

This last point suggests the appropriateness of turning to what is arguably the most objectionable feature of the statute that is the subject of this workshop: it applies equally to standards treated as guidance identifying a satisfactory but not mandatory means of complying with an independently stated regulatory obligation, and to standards incorporated in a manner that makes them the law itself—mandatory obligations in and of themselves. In my judgment, these two situations are quite different, both in law and in their implications for agency efficiency and effective regulation.

SDO standards converted into law—a mandatory obligation—by the manner of their incorporation suffer all the possible deficits mentioned above.

They end the competition among American voluntary consensus standard-setters that is identified by many as a particular strength of our system in relation to others.

Correspondingly, they confer monopoly pricing power on the SDO whose standard has been converted from a voluntary consensus standard into an involuntary, mandatory obligation.

They significantly limit agency capacity to respond to new developments, since changing a mandatory standard set by rule will require fresh rulemaking, with its procedural costs and obstacles. That this occurs in practice may be seen in the simple fact that over half of incorporated standards are more than seventeen years old—some, indeed, no longer “available” in any form, reasonably or not.

The income streams resulting from law-forced purchases of mandatory but outdated standards may be convenient for the SDOs receiving them, but bear no relationship either to sound industrial practice (adherence to the contemporary standard should be preferable) or to the SDO business model for sup-

porting the continuing development of standards.

Law is not subject to copyright. The Copyright Office knows this; it has been hornbook American law from the inception. The arguments here are most eloquently made in the FDMS docket comments of the ABA Section of Administrative Law and Regulatory Practice, and would be tedious to repeat at length. Moreover, this proposition is wholly independent of the policy concerns SDOs raise to argue that it should not be the case. It simply is the case and the consequence is that if an agency has converted a voluntary consensus standard into a legal obligation, it cannot fail to inform the public what is its legal obligation. (SDOs should perhaps for this reason resist agencies’ conversion of voluntary standards into legal obligations; and the question whether the agency must compensate the SDO for doing so is an open one. Some argue that the benefit to the SDO from the imprimatur of incorporation will exceed any detriment to its bottom line—incorporations typically involves only part of the standard involved, and most businesses will wish to purchase the standards in their full, convenient form. Moreover, incorporated standards make up only a fraction of an SDO’s armamentarium.) When Minnesota enacted the Uniform Commercial Code, the ALI (its drafter) retained its copyright for purposes of selling the UCC as such, but Minnesota was obliged to make its new code public, and was not obliged to pay ALI when it did so.

When an agency proposes incorporation by reference that will create legal obligations, it is strongly arguable that it must at that time make the standard proposed to be incorporated available to commenters in the rulemaking process. Contemporary administrative law caselaw and Executive Order 12,866 each impose transparency standards more demanding than might appear from the simple text of 5 U.S.C. §553. One cannot comment on a standard whose content is unknown. As the Pipeline Safety Trust observed in its FDMS comments, “incorporating standards by reference, the way it is done now, has turned notice and comment rulemaking into a caricature of what it was intended to be.”

Since agency guidance of means by which one might successfully comply with independently stated regulatory obligations is not law, an agency’s identification of a standard as one such means leaves interested parties an option whether to refer to the standard or not. It creates no legal obligation to reveal the contents of the standard used as guidance, and the SDO’s copyright is secure. It is of course also possible that there will be other identifiable means of regulatory compliance—the reputed strength of the American SDO process—so that recognition of the SDO’s copyright in relation to the guidance given creates no monopoly power.

Use of standards as guidance also permits ready upgrading of the guidance as soon as standards are revised; the troubling problem of outdated standards enduring as legal obligations (because fresh rulemaking has not been undertaken) need not arise.

It is, then, regrettable that the statute you are discussing draws no distinction between incorporation by reference as mandatory obligation, and its use to provide guidance. The most useful result of your workshop, in my judgment, would be to push hard for the recognition of this distinction—by interpretation of your statutory obligations, if that seems possible, or by working for amendment. But I can find no fault with, and much reason to support, the obligation PHMSA has been placed under to assure free public access, both at the stage of proposal and at

the stage of adoption, to standards whose incorporation by reference is used to create legal obligations. The effect of that use of incorporation is to transfer lawmaking into private hands that operate in secret; and “delegations of public power to private hands [undermine] the capacity to govern.”

Respectfully submitted,

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Betts Professor of Law.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. PETRI) that the House suspend the rules and pass the bill, H.R. 2576.

The question was taken.

The SPEAKER pro tempore. In the opinion of the Chair, two-thirds being in the affirmative, the ayes have it.

Mr. PETRI. Mr. Speaker, on that I demand the yeas and nays.

The yeas and nays were ordered.

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX, further proceedings on this motion will be postponed.

#### RECESS

The SPEAKER pro tempore. Pursuant to clause 12(a) of rule I, the Chair declares the House in recess until approximately 6:30 p.m. today.

Accordingly (at 5 o’clock and 37 minutes p.m.), the House stood in recess.

□ 1830

#### AFTER RECESS

The recess having expired, the House was called to order by the Speaker pro tempore (Mr. HULTGREN) at 6 o’clock and 30 minutes p.m.

#### ANNOUNCEMENT BY THE SPEAKER PRO TEMPORE

The SPEAKER pro tempore. Pursuant to clause 8 of rule XX, proceedings will resume on motions to suspend the rules previously postponed.

Votes will be taken in the following order:

H.R. 2576, by the yeas and nays;

H.R. 1848, by the yeas and nays;

H.R. 2611, by the yeas and nays.

The first electronic vote will be conducted as a 15-minute vote. Remaining electronic votes will be conducted as 5-minute votes.

#### AVAILABILITY OF PIPELINE SAFETY REGULATORY DOCUMENTS

The SPEAKER pro tempore. The unfinished business is the vote on the motion to suspend the rules and pass the bill (H.R. 2576) to amend title 49, United States Code, to modify requirements relating to the availability of pipeline safety regulatory documents, and for other purposes, on which the yeas and nays were ordered.

The Clerk read the title of the bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr.

PETRI) that the House suspend the rules and pass the bill.

The vote was taken by electronic device, and there were—yeas 405, nays 2, not voting 26, as follows:

[Roll No. 354]

YEAS—405

Aderholt	Denham	Joyce
Alexander	Dent	Kaptur
Amash	DeSantis	Kelly (PA)
Amodei	DesJarlais	Kennedy
Andrews	Diaz-Balart	Kildee
Bachmann	Doggett	Kilmer
Bachus	Doyle	Kind
Barber	Duckworth	King (IA)
Barletta	Duffy	King (NY)
Barr	Duncan (SC)	Kinzinger (IL)
Barrow (GA)	Duncan (TN)	Kirkpatrick
Barton	Edwards	Kline
Beatty	Ellison	Kuster
Becerra	Ellmers	Labrador
Benishek	Enyart	LaMalfa
Bentivolio	Eshoo	Lamborn
Bera (CA)	Esty	Lance
Bilirakis	Farenthold	Langevin
Bishop (GA)	Farr	Lankford
Bishop (NY)	Fattah	Larsen (WA)
Bishop (UT)	Fincher	Larson (CT)
Black	Fitzpatrick	Latham
Blackburn	Fleischmann	Latta
Blumenauer	Fleming	Lee (CA)
Bonamici	Flores	Levin
Bonner	Forbes	Lewis
Boustany	Fortenberry	Lipinski
Brady (PA)	Foster	LoBiondo
Brady (TX)	Fox	Loebsack
Braley (IA)	Frankel (FL)	Lofgren
Bridenstine	Franks (AZ)	Long
Brooks (AL)	Frelinghuysen	Lowenthal
Brooks (IN)	Gabbard	Lowe
Broun (GA)	Galleo	Lucas
Brown (FL)	Garamendi	Lujan Grisham
Brownley (CA)	Garcia	(NM)
Bucshon	Gardner	Lujan, Ben Ray
Burgess	Garrett	(NM)
Bustos	Gerlach	Lynch
Butterfield	Gibbs	Maffei
Calvert	Gibson	Maloney,
Camp	Gingrey (GA)	Carolyn
Cantor	Gohmert	Maloney, Sean
Capito	Goodlatte	Marchant
Capps	Gosar	Massie
Capuano	Gowdy	Matheson
Cárdenas	Granger	Matsui
Carney	Graves (GA)	McCarthy (CA)
Carson (IN)	Graves (MO)	McCaul
Carter	Grayson	McClintock
Cartwright	Green, Gene	McCollum
Cassidy	Griffin (AR)	McDermott
Castor (FL)	Griffith (VA)	McGovern
Castro (TX)	Grijalva	McHenry
Chabot	Guthrie	McIntyre
Chaffetz	Gutiérrez	McKeon
Chu	Hahn	McKinley
Cicilline	Hall	McMorris
Clarke	Hanabusa	Rodgers
Cleaver	Hanna	McNerney
Clyburn	Harper	Meadows
Coble	Harris	Meehan
Coffman	Hartzler	Meeks
Cohen	Hastings (FL)	Meng
Cole	Hastings (WA)	Messer
Collins (GA)	Heck (NV)	Mica
Collins (NY)	Heck (WA)	Michaud
Conaway	Hensarling	Miller (FL)
Connolly	Higgins	Miller (MI)
Conyers	Himes	Miller, Gary
Cook	Holding	Miller, George
Cooper	Honda	Moore
Costa	Hoyer	Moran
Cotton	Hudson	Mullin
Courtney	Huelskamp	Mulvaney
Cramer	Huffman	Murphy (FL)
Crawford	Huizenga (MI)	Murphy (PA)
Crenshaw	Hultgren	Nadler
Crowley	Hurt	Napolitano
Cuellar	Israel	Neal
Culberson	Issa	Neugebauer
Cummings	Jackson Lee	Noem
Daines	Jeffries	Nolan
Davis (CA)	Jenkins	Nugent
Davis, Danny	Johnson (GA)	Nunes
Davis, Rodney	Johnson (OH)	Nunnelee
DeGette	Johnson, E. B.	O'Rourke
Delaney	Johnson, Sam	Olson
DeLauro	Jones	Owens
DeBene	Jordan	Palazzo

Pallone	Ruiz
Pascarella	Runyan
Pastor (AZ)	Ruppersberger
Paulsen	Rush
Payne	Ryan (OH)
Pearce	Ryan (WI)
Pelosi	Salmon
Perlmutter	Sánchez, Linda
Perry	T.
Peters (CA)	Sanchez, Loretta
Peters (MI)	Sanford
Peterson	Sarbanes
Petri	Scalise
Pingree (ME)	Schakowsky
Pittenger	Schiff
Pitts	Schneider
Pocan	Schock
Poe (TX)	Schrader
Polis	Schwartz
Pompeo	Schweikert
Posey	Scott (VA)
Price (GA)	Scott, Austin
Price (NC)	Scott, David
Quigley	Sensenbrenner
Radel	Serrano
Rahall	Sessions
Rangel	Sewell (AL)
Reed	Sherman
Reichert	Shinkus
Renacci	Shuster
Ribble	Simpson
Rice (SC)	Sinema
Richmond	Sires
Rigell	Slaughter
Roby	Smith (NE)
Roe (TN)	Smith (NJ)
Rogers (AL)	Smith (TX)
Rogers (KY)	Smith (WA)
Rogers (MI)	Southerland
Rokita	Speier
Rooney	Stewart
Ros-Lehtinen	Stivers
Roskam	Stockman
Ross	Stutzman
Rothfus	Swailwell (CA)
Roybal-Allard	Takano
Royce	Terry

NAYS—2

Shea-Porter

NOT VOTING—26

Bass	Grimm	Luetkemeyer
Buchanan	Herrera Beutler	Lummis
Campbell	Hinojosa	Marino
Clay	Holt	McCarthy (NY)
DeFazio	Horsford	Negrete McLeod
Deutch	Hunter	Rohrabacher
Engel	Keating	Smith (MO)
Fudge	Kelly (IL)	Wasserman
Green, Al	Kingston	Schultz

□ 1858

Mr. DINGELL changed his vote from “yea” to “nay.”

Messrs. PASTOR of Arizona, DESANTIS, WOODALL, and HUIZENGA of Michigan changed their vote from “nay” to “yea.”

So (two-thirds being in the affirmative) the rules were suspended and the bill was passed.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

#### SMALL AIRPLANE REVITALIZATION ACT OF 2013

The SPEAKER pro tempore. The unfinished business is the vote on the motion to suspend the rules and pass the bill (H.R. 1848) to ensure that the Federal Aviation Administration advances the safety of small airplanes, and the continued development of the general aviation industry, and for other purposes, as amended, on which the yeas and nays were ordered.

The Clerk read the title of the bill.

The SPEAKER pro tempore. The question is on the motion offered by the gentleman from Wisconsin (Mr. PETRI) that the House suspend the rules and pass the bill, as amended.

This is a 5-minute vote.

The vote was taken by electronic device, and there were—yeas 411, nays 0, not voting 22, as follows:

[Roll No. 355]

YEAS—411

Aderholt	Davis (CA)	Huffman
Alexander	Davis, Danny	Huizenga (MI)
Amash	Davis, Rodney	Hultgren
Amodei	DeGette	Hurt
Andrews	Delaney	Israel
Bachmann	DeLauro	Issa
Bachus	DeBene	Jackson Lee
Barber	Denham	Jeffries
Barletta	Dent	Jenkins
Barr	DeSantis	Johnson (GA)
Barrow (GA)	DesJarlais	Johnson (OH)
Barton	Diaz-Balart	Johnson, E. B.
Bass	Dingell	Johnson, Sam
Beatty	Doggett	Jones
Becerra	Doyle	Jordan
Benishek	Duckworth	Joyce
Bentivolio	Duffy	Kaptur
Bera (CA)	Duncan (SC)	Keating
Bilirakis	Duncan (TN)	Kelly (PA)
Bishop (GA)	Edwards	Kennedy
Bishop (NY)	Ellison	Kildee
Bishop (UT)	Ellmers	Kilmer
Black	Enyart	Kind
Blackburn	Eshoo	King (IA)
Blumenauer	Esty	King (NY)
Bonamici	Farenthold	Kinzinger (IL)
Bonner	Farr	Kirkpatrick
Boustany	Fattah	Kline
Brady (PA)	Fincher	Kuster
Brady (TX)	Fitzpatrick	Labrador
Braley (IA)	Fleischmann	LaMalfa
Bridenstine	Fleming	Lamborn
Brooks (AL)	Flores	Lance
Brooks (IN)	Forbes	Langevin
Broun (GA)	Fortenberry	Lankford
Brown (FL)	Foster	Larsen (WA)
Brownley (CA)	Fox	Larson (CT)
Bucshon	Frankel (FL)	Latham
Burgess	Franks (AZ)	Latta
Bustos	Frelinghuysen	Lee (CA)
Butterfield	Gabbard	Levin
Calvert	Galleo	Lewis
Camp	Garamendi	Lipinski
Cantor	Garcia	LoBiondo
Capito	Gardner	Loebsack
Capps	Garrett	Lofgren
Capuano	Gerlach	Long
Cárdenas	Gibbs	Lowenthal
Carney	Gibson	Lowe
Carson (IN)	Gingrey (GA)	Lucas
Carter	Gohmert	Lujan Grisham
Cartwright	Goodlatte	(NM)
Cassidy	Gosar	Lujan, Ben Ray
Castor (FL)	Gowdy	(NM)
Castro (TX)	Granger	Lummis
Chabot	Graves (GA)	Lynch
Chaffetz	Graves (MO)	Maffei
Chu	Grayson	Maloney,
Cicilline	Green, Al	Carolyn
Clarke	Green, Gene	Maloney, Sean
Cleaver	Griffin (AR)	Marchant
Clyburn	Griffith (VA)	Massie
Coble	Grijalva	Matheson
Coffman	Guthrie	Matsui
Cohen	Gutiérrez	McCarthy (CA)
Cole	Hahn	McCaul
Collins (GA)	Hall	McClintock
Collins (NY)	Hanabusa	McCollum
Conaway	Hanna	McDermott
Connolly	Harper	McGovern
Conyers	Harris	McHenry
Cook	Hartzler	McIntyre
Cooper	Hastings (FL)	McKeon
Cooper	Hastings (WA)	McKinley
Cotton	Heck (NV)	McMorris
Courtney	Heck (WA)	Rodgers
Cramer	Hensarling	McNerney
Crawford	Higgins	Meadows
Crenshaw	Himes	Meehan
Crowley	Holding	Meeks
Cuellar	Honda	Meng
Culberson	Hoyer	Messer
Cummings	Hudson	Mica
Daines	Huelskamp	Michaud